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FILED

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 190

BROOKS TRANSPORTATION COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

William M. Blackwell,
Of Counsel,

J. Minor Beale,
Counsel for Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 1419

BROOKS TRANSPORTATION COMPANY, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION.
Defendants-Appellees

STATEMENT AS TO JURISDICTION

Re Appeal to Supreme Court of the United States

§1253 (U.S.C.A. Title 28) *Direct appeals from decisions of three-judge courts—*

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

See 2101(b)—Time—60 days.

The District Court of the United States had jurisdiction under U.S.C.A. Title 28, Sections 1336, 1398, 2284, 2321 to 2325.

The allowance of appeal is covered by Rule 36 of the Supreme Court of the United States.

BROOKS TRANSPORTATION COMPANY, INC.,
By J. NINIAN BEALL,
Attorney for Plaintiff-Appellant.

Washington, May 19, 1952.

J. NINIAN BEALL,
Investment Building,
Washington 5, D. C.
WILLIAM M. BLACKWELL,
State-Planters Bank Building,
Richmond 19, Virginia.

Appendix "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Civil Action No. 1419

BROOKS TRANSPORTATION COMPANY, INCORPORATED

v.

UNITED STATES

J. Ninian Beall, Washington, D. C., and William M. Blackwell, Richmond, Virginia, for plaintiff.

Daniel W. Knowlton, Chief Counsel, and C. H. Johns, Attorney, both of Washington, D. C., for Interstate Commerce Commission.

H. G. Morrison, Assistant Attorney General, William J. Hickey, Assistant Attorney General, James E. Kilday, Special Assistant to Attorney General, all of Washington, D. C., A. Carter Whitehead, United States Attorney, Richmond, Virginia, and William P. Woolls, Jr., Special Assistant to the United States Attorney, Alexandria, Virginia, for United States.

Wilmer A. Hill, Washington, D. C., and Henry E. Ketner, Richmond, Virginia, for Falwell Fast Freight, Incorporated, and Red Line, Incorporated.

Before Dobie, Circuit Judge, and Hutcheson and Bryan, District Judges.

HUTCHESON, District Judge:

In this action the plaintiff, Brooks Transportation Company, Incorporated (hereinafter referred to as Brooks or plaintiff), seeks to have set aside certain orders of the Interstate Commerce Commission (hereinafter referred to as the Commission), which deny the plaintiff authority to render transportation services as a common carrier to and from Piney River, Virginia.

The plaintiff is a Class I motor carrier, conducting general freight operations over regular routes extending be-

tween points in North Carolina northward through Virginia. A portion of its operating rights are held under what is known as the "grandfather" clause of Sections 206(a) and 209(a) of the Interstate Commerce Act. (49 U.S.C.A. 306-309).

On February 12, 1936, the plaintiff in accordance with provisions of the Act filed with the Commission application for authority to continue its motor carrier operations in interstate or foreign commerce over certain designated routes between points in Virginia and states to the north. The routes claimed by it in Virginia extended northward from Richmond over U. S. Highway No. 1 to Alexandria, and west over U. S. Highway No. 60, Virginia Highway No. 45, and U. S. Highway No. 406, by way of Farmville and Lynchburg to Roanoke. In the westward operation it claimed all intermediate points and twelve off-point routes. Among others it claimed a route over U. S. Highway No. 60 by Buckingham to Amherst and thence over U. S. Highway No. 29 to Lynchburg.

Effective June 1, 1937, with the approval of the Commission, Brooks purchased the operations of Jacobs Transfer Company, including its "grandfather" application covering rights between Washington, D. C. and Roanoke and Danville, via Winchester, Warrenton, Staunton, Charlottesville, Lexington and Lynchburg, including all intermediate points. This included a route between Charlottesville and Lynchburg over U. S. Highway No. 29, on which Piney River was located.

Under the usual informal procedure set forth in *Crescent Express Lines* v. *United States*, 320 U. S., 401, and *Evans* v. *United States*, 65 Fed. Supp. 183, Division 5 issued its first compliance order on June 30, 1938, setting forth specifically the authority to which Brooks appeared entitled under its own application as well as the application of Jacobs Transfer Company. Due to a clerical error, on July 12, 1938, that order was vacated and a second compliance order issued. Red Line, Incorporated, a competing carrier, filed a protest to the second compliance order, objecting to the grant of any authority to the plaintiff to serve points south of Staunton and Charlottesville, to which protest Brooks filed an answer. U. S. Highway No. 29 extends

from Charlottesville to Lynchburg and as stated is a route claimed by Jacobs under its "grandfather" application acquired by Brooks as previously mentioned. Piney River was located on U. S. Highway No. 29 between Charlottesville and Lynchburg until 1947, when the highway was changed; and Piney River is now by-passed by a distance of about five miles. Thus it will be seen that in 1938 Brooks' right to serve Piney River was placed in issue.

On February 13, 1939, the Commission vacated its order of July 12, 1938, and issued a new one containing certain changes in the authority of Brooks to serve northern points but leaving substantially unchanged the service authorized in Virginia. Mundy Motor Lines filed a protest against the last order, to which Brooks replied. Among other things, Mundy objected to the authority proposed to be granted to serve the intermediate points on U. S. Highway No. 29 between Lynchburg and Charlottesville, as well as four off-route points. In its answer Brooks contended it had served the four off-route points in its own operation and that the routes over U. S. Highway No. 29 between Lynchburg and Charlottesville had been obtained from Jacobs. The Commission, after further consideration, on March 11, 1939, vacated the outstanding compliance order and issued a new one containing certain changes not pertinent here. Certain protests were again filed and on August 25, 1939, the Commission vacated the outstanding compliance order and issued a new one, which eliminated the four off-route points, as well as the route between Charlottesville and Lynchburg; and set for formal hearing the matter of the off-route points and the Charlottesville to Lynchburg route. The first formal hearing on the issues was held on January 22, 1942, before a joint board, which, on May 9, 1942, served its recommended report and order, finding that Brooks had failed to establish any right to serve the four off-route points or to operate over U. S. Highway No. 29 between Charlottesville and Lynchburg. It also found that Brooks had failed to establish any right to serve the intermediate points on said Highway 29. The Commission issued a certificate on May 25, 1942, confirming only those rights set forth in the compliance order of August 25, 1939, which, it is to be recalled, eliminated the route between Charlottes-

ville and Lynchburg. Exceptions were filed by Brooks to the recommended report and order of the joint board and on May 22, 1943, Division 5 issued its report and order, which, in substance, adopted the recommended report and order of the joint board. In that report and order it was specifically held that Brooks had failed to show that it and its predecessor were entitled under the "grandfather" provisions of the Act to operate as a common or contract carrier by motor vehicle in interstate or foreign commerce, of general commodities, with exceptions, between Charlottesville and Lynchburg, and that the application seeking to continue operations should be denied. (No. M.C.—59911.)

On July 3, 1943, Brooks filed a petition for a further hearing, which petition stated, in part, that with respect to the Charlottesville-Lynchburg route (U. S. Highway 29), Brooks claimed the right to operate by reason of its purchase of the Jacobs rights and with respect to the operation over U. S. Highway 29 between Amherst and Lynchburg, petitioner claimed the right by virtue of its own "grandfather" application in Docket M.C.-80382. Brooks further alleged that it never understood that its claims to U. S. Highway 29 from Amherst to Lynchburg were ever in issue and for that reason offered no evidence as to its operations on the "grandfather" date, alleging that it was taken by surprise concerning the subject of the hearing and that the Commission misconceived the issues. Brooks filed a supplement to its petition on July 9, 1943, in which it asserted that it had found certain original records of Jacobs and was in a position to furnish documentary proof of movements over the routes and to the points involved both prior and subsequent to the "grandfather" date. Protests were filed to this petition and the Commission, Division 5, by order of August 27, 1943, reopened the proceedings to determine the rights of Brooks to continue operations over certain regular routes, including that between Charlottesville and Lynchburg over U. S. Highway 29 serving all intermediate points and certain off-route points.

In the meantime, Brooks, on July 12, 1943, had filed an extension application under Section 207, docketed as No. M.C.-80382 (Sub. No. 11), seeking substantially the same authority which it was claiming under the "grandfather"

applications. At the opening of the formal hearing before a joint board on November 12, 1943, Brooks amended its applications so far as is pertinent here by deleting therefrom all claim among others, to the right to serve any point on U. S. Highway 29 between Charlottesville and Lynchburg. (Tr. 78-82.) Thereafter, on June 7, 1944, Division 5 issued its report and recommended order, in which it found that Brooks had failed to establish that it or its predecessor, Jacobs, was entitled under the "grandfather" provision of the Act to operate between Charlottesville and Lynchburg over U. S. Highway 29 and in that respect the application was denied; but the Commission found that present and future public convenience and necessity required operation by Brooks as a common carrier by motor vehicle between Charlottesville and Lynchburg over U. S. Highway 29, serving no intermediate points but conducting what is known as a *closed door* operation over said highway. No. M.C.-80382 (Sub. No. 11). A petition for reconsideration was filed by certain railroads and answered by Brooks, which petition was denied by the Commission on November 7, 1944.

It is to be noted that up to this point no reference to Piney River had been made, although it would fall into the category of intermediate points on Highway 29 between Lynchburg and Charlottesville until October 1947, and as such would be directly involved in the supplement filed by Brooks on July 9, 1943, and the report and recommended order of June 7, 1944, during which time it was an intermediate point between Lynchburg and Charlottesville.

It appears clearly that at this time the administrative process concerning the "grandfather" rights of Brooks including any rights it acquired from Jacobs was finally ended.

On January 24, 1951, plaintiff filed an application for a certificate authorizing it to continue a "grandfather" operation in the transportation of general commodities to and from all points within a radius of thirty-five miles of Lynchburg, which would include Piney River, stating that it had been serving this territory for twenty years and through inadvertence had omitted these points from its "grandfather" application.

After plaintiff presented certain evidence of its alleged "grandfather" operations to the field staff of the Commission, Director Blanning on February 21 wrote a letter in which he stated that the investigation failed to disclose a valid claim to the "grandfather" operation but that the application had been accepted as one for authority to extend an operation. The application was assigned Docket No. 80382, Sub. 17. On February 26, 1951, plaintiff filed a pleading entitled "Petition for correction of certificate to specifically include Piney River, Va." In March another opportunity was afforded the plaintiff to submit evidence to the field staff, at which time an additional affidavit was submitted to the general effect that the plaintiff had rendered service to Piney River since 1931. On October 16, 1951, the Commission denied the petition and entered an order containing a "cease and desist" clause.* On October 22, 1951, plaintiff filed a petition for reconsideration of the order, which petition was denied on February 4, 1952.

In the meantime, on May 18, 1951, plaintiff amended its application which had been filed on January 24, 1951, by deleting its claim to all points except Piney River and was allowed to introduce evidence of past operations at that point, which application was denied by order of November 19, 1951. A petition for reconsideration was denied on February 4, 1952.

From the foregoing statement it will be seen that after numerous hearings, plaintiff's right under the "grandfather" clause to serve Piney River has been given full consideration and denied. It is to be noted that in its application of February 12, 1936, plaintiff claimed, among other routes, Amherst to Lynchburg over U. S. Highway 29. Piney River was north of Amherst on U. S. 29, but effective June 1, 1937, the plaintiff became the owner of the Jacobs "grandfather" application, which claimed operation between Charlottesville and Lynchburg over U. S. Highway 29, and after numerous hearings the Commission found that neither the plaintiff, nor its predecessor Jacobs, was entitled to serve the route including Piney River. Sub-

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* The "cease and desist" clause has been extended at the request of the Court until May 19, 1952.

sequently, in 1944, when plaintiff was granted the right to operate over U. S. Highway 29 between Charlottesville and Lynchburg, it was granted a *closed-door* operation and the administrative process was ended on November 7, 1944.

This action disposed of the entire proceedings whether considered as application for extension of service under Section 207 or as an application to correct the "grandfather" certificate under Sections 206-209.

Brooks seeks to have the orders complained of set aside and enjoined on the following grounds:

1. The orders of the Commission are arbitrary, capricious, illegal, null and void in that plaintiff was denied a fair and reasonable hearing.

2. The orders of the Commission are arbitrary, capricious, illegal, null and void in that, through failure to conduct a fair and reasonable hearing, they divest Brooks of vested statutory property rights under the "grandfather" clause of Section 206(a) of Part II of the Interstate Commerce Act.

3. The orders of the Commission are arbitrary, capricious, illegal, null and void in that the Commission exceeded its statutory powers, misconceived its functions in failing and refusing to conduct hearings, and thereby deprived plaintiff of its vested property rights.

4. The orders of the Commission are arbitrary, capricious, illegal, null and void in that they are not supported by any evidence and are contrary to substantial evidence which stands undisputed.

5. The orders of the Commission are illegal, null and void in that they fail to decide the issues presented, fail to state reasons for the action taken and, therefore, fail to conform to the requirements of the Administrative Procedure Act.

From the foregoing statement of facts it clearly appears that the plaintiff having had its claim to rights under the "grandfather" clause finally determined on November 7, 1944, by its application of January 24, 1951, undertook to reopen the matter with the object of obtaining the right to serve Piney River. During the period following the final determination in 1944 the development of a considerable

industry at Piney River by the American Cyanamid Company caused a large increase in the volume of business originating at that point. This has been handled by Brooks without holding a certificate authorizing it to do so. While the record shows that there are some half dozen or more carriers authorized, willing and able to serve Piney River, Brooks has been rendering service satisfactory to the shipper there and in some manner the limitation upon the certificate held by Brooks was overlooked. In that situation Brooks undertook to again invoke its claim under the "grandfather" clause which had long since been determined adversely by the Commission and long since the expiration of the sixty-day period provided for in Rule 101 of the Commission's General Rules of Practice.

Notwithstanding the numerous hearings dealing with Brooks' purported "grandfather" claims, including those acquired by it from Jacobs, and the clear waiver of Brooks on November 12, 1943, to intermediate points on Highway 29 (Tr. 80-82) when Brooks was seeking to obtain a closed-door operation over the same route, the Commission proceeded to hear additional evidence concerning Brooks' "grandfather" rights in 1951, under application heard by a joint board on May 18, 1951. During the course of the present proceedings the Commission also considered the application as a petition for a certificate showing public convenience and necessity in extension proceedings.

That a petition for rehearing of a proceeding before the Commission is a question addressed to the sound discretion of the Commission is too well settled to need further discussion. *Carolina Scenic Coach Line* v. *United States*, 59 Fed. Supp., 336, affirmed 326 U. S. 680; *Interstate Commerce Commision* v. *Jersey City*, 322 U. S. 503. Only a showing of abuse of discretion may sustain an exception to that rule. *United States* v. *Pierce Auto Lines*, 327 U. S., 315. The recital of the facts in connection with the various hearings reveals conclusively that Brooks has been afforded full opportunity to show any right it had to serve intermediate points on U. S. Highway 29 between Charlottesville and Lynchburg (which included Piney River) in the "grandfather" proceeding. That right was finally waived at the Commission's hearing on November 12, 1943 (Tr. 80),

when Brooks was seeking and obtained permission for a certificate covering a closed-door operation over Highway 29.

It is equally clear from a bare recital of the facts that Brooks has been afforded a full hearing concerning its rights under the "grandfather" clause. In this connection reference is again made to the fact that under the Commission's Rule 101 the last series of hearings could have been summarily dismissed. This was not done but upon the contrary the Commission afforded Brooks further opportunity to present such evidence in the latest series of hearings and made its finding that Brooks has failed to furnish sufficient proof of service to Piney River prior to and continuously since June 1, 1935. At most, the application if considered as being based upon the "grandfather" clause, was a petition for reconsideration or a further hearing and Brooks could not complain if no reason had been assigned for his denial. *Carolina Scenic Coach Lines* v. *United States,* supra.

Turning to a consideration of the application as one for an extension of service, it is well settled that the question on review is not whether the Court would have made the same findings as the Commission on the record before it, but is: Was there a rational basis for the finding made by the Commission? *Norfolk Southern Bus Company* v. *United States,* 96 Fed. Supp., 756, affirmed 340 U. S., 802; *Brooks Transportation Company* v. *United States,* 93 Fed. Supp., 517, affirmed 340 U. S., 925; *Arlington County Board* v. *United States,* 101 Fed. Supp., 328. See also *Interstate Commerce Commission* v. *Parker,* 326 U. S., 60.

However, the record contains adequate evidence to support a finding that public convenience and necessity does not require service at Piney River by Brooks.

Eight motor vehicle carriers appeared in opposition to the application at the hearing and proved to the satisfaction of the Commission that they were able and anxious to supply the service.

From the foregoing it is obvious that the plaintiff has been afforded a fair and reasonable hearing by the Commission; that the Commission has not exceeded its statutory powers nor misconceived its functions; nor has it

deprived plaintiff of any vested property rights; the orders of the Commission are supported by the evidence and the Commission has fully complied with the requirements of the Act. In fact, upon consideration of the entire record it is obvious that the conclusion of the Commission not only has a rational basis but it is the proper conclusion in view of the facts disclosed by the record.

The injunction is denied and the suit dismissed.

ARMISTEAD M. DOBIE,
United States Circuit Judge.
STERLING HUTCHESON,
United States District Judge.
ALBERT V. BRYAN,
United States District Judge.

May 12, 1952.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 190

BROOKS TRANSPORTATION COMPANY, INC.,
Appellant

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal From the United States District Court For the Eastern District of Virginia

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MOTION OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

Appellees United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of this Court, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on May 12, 1952, by a district court of

three judges specially constituted pursuant to 28 U.S.C. 1253, 2284 and 2325, dismissing appellant's complaint, which sought to set aside certain orders of the Interstate Commerce Commission. Appeal was allowed on May 23, 1950, but the appellant did not serve its appeal papers upon appellees United States of America and Interstate Commerce Commission within five days after allowance of the appeal, as required by Rule 12, paragraph 2, of the Rules of this Court. The appeal papers were first served upon these appellees on July 14, 1952, after the record on appeal had been docketed in this Court.[1]

The orders of the Commission attacked in this proceeding denied to appellant operating rights to serve Piney River, Virginia, which appellant claimed under the "grandfather" clause of Sections 206(a) and 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a), 309(a). The district court unanimously upheld the Commission's orders, and the court declined to stay its judgment pending appeal. On application to this Court for such a stay, the requested stay was again denied.

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[1] The appeal papers as served do not meet the requirements of the Court's Rules. Contrary to paragraph 1 of Rule 12, the statement as to jurisdiction does not include a statement of the grounds upon which it is contended that the questions involved in the appeal are substantial, and the district court's opinion is not appended to the jurisdictional statement. Contrary to paragraph 2 of Rule 12, no statement directing attention to paragraph 3 of Rule 12 was served upon the present appellees.

The pertinent facts sustaining the action of the Commission and the district court are fully set forth in the opinion of the district court,[2] and may be summarized as follows:

Appellant has been granted operating rights under the grandfather clause of the statute covering several thousands of miles of highways reaching from New York to North Carolina. The issue in this proceeding is whether appellant is entitled to operating rights, based on the grandfather clause, to serve a mining operation at Piney River, Virginia. In 1942 the Commission, after extensive hearings, issued a report and order which, among other things, denied to appellant any grandfather rights on U. S. Highway 29 between Charlottesville and Lynchburg.[3] In 1943 appellant requested a further hearing, and also sought operating rights for this route upon the basis of public convenience and necessity. When the matter came on for hearing appellant amended its applications by deleting all claims to intermediate points. The Commission by a report and order issued on November 7, 1944, determined that

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[2] The district court's opinion has not yet been reported. A copy of its opinion was attached to the petition for a stay pending appeal which appellant filed with this Court. Copy is attached as an appendix.

[3] Until 1947 Piney River was located on U. S. Highway No. 29 between Charlottesville and Lynchburg. In that year the highway was changed, and it now by-passes Piney River by a distance of about five miles.

appellant had not established its claim to grandfather rights, but found that public convenience and necessity required that appellant operate as a common carrier between Charlottesville and Lynchburg over U. S. Highway 29, serving no intermediate points, but conducting what is known as a closed-door operation.

In January 1951 appellant filed an application for a certificate authorizing it to continue a "grandfather" operation in the transportation of general commodities to and from all points within a radius of 35 miles of Lynchburg. Later appellant amended this application so as to limit it to Piney River, which is within a 35-mile radius. After appellant had submitted certain evidence, the Commission in October 1951 denied the application. Eight carriers by motor vehicle who appeared in opposition to the application "proved to the satisfaction of the Commission that they were able and anxious" to serve Piney River.

Appellees submit that this appeal presents no substantial questions. The district court found that appellant's claimed grandfather rights "had been given full consideration" by the Commission; that when appellant was granted a closed-door operation between Charlottesville and Lynchburg on November 7, 1944, "the administrative process was ended"; and that the application made in 1951 for a reopening of the issue was "addressed to the sound discretion of the Commission" and, under

the Commission's rules, "could have been summarily dismissed." The court observed that the Commission did not do this, and gave appellant an opportunity to present evidence. The court, citing *Carolina Scenic Coach Lines* v. *United States,* 59 F. Supp. 336 (W.D.N.C.), affirmed 326 U.S. 680, said that appellant would have no right to complain if "no reason had been assigned for" denial of reconsideration, but that the Commission had, in fact, made a finding that the proof submitted was insufficient to establish service by appellant to Piney River prior to and continuously from June 1, 1935, the date fixed by the Act for determining grandfather rights.

Appellant's claims have been given full consideration, both by the Commission and by the district court, and have been found to be without merit. Appellant makes no showing that its appeal presents any question of substance, and it is clear from our statement of the issues and of the decision below that no such question is presented. It is therefore respectfully submitted that the decree of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce
Commission.

JULY 1952.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Divison

Civil Action No. 1419

BROOKS TRANSPORTATION COMPANY, INCORPORATED

v.

UNITED STATES

J. Ninian Beall, Washington, D. C., and William M. Blackwell, Richmond, Virginia, for plaintiff.

Daniel W. Knowlton, Chief Counsel, and C. H. Johns, Attorney, both of Washington, D. C., for Interstate Commerce Commission.

H. G. Morrison, Assistant Attorney General, William J. Hickey, Assistant Attorney General, James E. Kilday, Special Assistant to Attorney General, all of Washington, D. C., A. Carter Whitehead, United States Attorney, Richmond, Virginia, and William P. Woolls, Jr., Special Assistant to the United States Attorney, Alexandria, Virginia, for United States.

Wilmer A. Hill, Washington, D. C., and Henry E. Ketner, Richmond, Virginia, for Falwell

Fast Freight, Incorporated, and Red Line, Incorporated.

Before Dobie, Circuit Judge, and Hutcheson and Bryan, District Judges.

HUTCHESON, District Judge:

In this action the plaintiff, Brooks Transportation Company, Incorporated, (hereinafter referred to as Brooks or plaintiff), seeks to have set aside certain orders of the Interstate Commerce Commission (hereinafter referred to as the Commission), which deny the plaintiff authority to render transportation services as a common carrier to and from Piney River, Virginia.

The plaintiff is a Class I motor carrier, conducting general freight operations over regular routes extending between points in North Carolina northward through Virginia. A portion of its operating rights are held under what is known as the "grandfather" clause of Sections 206(a) and 209(a) of the Interstate Commerce Act. (49 U.S.C.A., 306-309).

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Highway No. 60, Virginia Highway No. 45, and U.S. Highway No. 406, by way of Farmville and Lynchburg to Roanoke. In the westward operation it claimed all intermediate points and twelve off-point routes. Among others it claimed a route over U.S. Highway No. 60 by Buckingham to Amherst and thence over U.S. Highway No. 29 to Lynchburg.

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March 11, 1939, vacated the outstanding compliance order and issued a new one containing certain changes not pertinent here. Certain protests were again filed and on August 25, 1939, the Commission vacated the outstanding compliance order and issued a new one, which eliminated the four off-route points, as well as the route between Charlottesville and Lynchburg; and set for formal hearing the matter of the off-route points and the Charlottesville to Lynchburg route. The first formal hearing on the issues was held on January 22, 1942, before a joint board, which, on May 9, 1942, served its recommended report and order, finding that Brooks had failed to establish any right to serve the four off-route points or to operate over U.S. Highway No. 29 between Charlottesville and Lynchburg. It also found that Brooks had failed to establish any right to serve the intermediate points on said Highway 29. The Commission issued a certificate on May 25, 1942, confirming only those rights set forth in the compliance order of August 25, 1939, which, it is to be recalled, eliminated the route between Charlottesville and Lynchburg. Exceptions were filed by Brooks to the recommended report and order of the joint board and on May 22, 1943, Division 5 issued its report and order, which, in substance, adopted the recommended report and order of the joint board. In that report and order it was specifically held that Brooks had failed to

show that it and its predecessor were entitled under the "grandfather" provisions of the Act to operate as a common or contract carrier by motor vehicle in interstate or foreign commerce, of general commodities, with exceptions, between Charlottesville and Lynchburg, and that the application seeking to continue operations should be denied. (No. M.C.-59911)

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to the "grandfather" date. Protests were filed to this petition and the Commission, Division 5, by order of August 27, 1943, reopened the proceedings to determine the rights of Brooks to continue operations over certain regular routes, including that between Charlottesville and Lynchburg over U.S. Highway 29 serving all intermediate points and certain off-route points.

In the meantime, Brooks, on July 12, 1943, had filed an extension application under Section 207, docketed as No. M.C.-80382 (Sub. No. 11), seeking substantially the same authority which it was claiming under the "grandfather" applications. At the opening of the formal hearing before a joint board on November 12, 1943, Brooks amended its applications so far as is pertinent here by deleting therefrom all claim among others, to the right to serve any point on U.S. Highway 29 between Charlottesville and Lynchburg. (Tr. 78-82) Thereafter, on June 7, 1944, Division 5 issued its report and recommended order, in which it found that Brooks had failed to establish that it or its predecessor, Jacobs, was entitled under the "grandfather" provision of the Act to operate between Charlottesville and Lynchburg over U.S. Highway 29 and in that respect the application was denied; but the Commission found that present and future public convenience and necessity required operation by Brooks as a common carrier by motor vehicle between

Charlottesville and Lynchburg over U.S. Highway 29, serving no intermediate points but conducting what is known as a *closed door* operation over said highway. No. M.C.-80382 (Sub. No. 11) A petition for reconsideration was filed by certain railroads and answered by Brooks, which petition was denied by the Commission on November 7, 1944.

It is to be noted that up to this point no reference to Piney River had been made, although it would fall into the category of intermediate points on Highway 29 between Lynchburg and Charlottesville until October 1947, and as such would be directly involved in the supplement filed by Brooks on July 9, 1943, and the report and recommended order of June 7, 1944, during which time it was an intermediate point between Lynchburg and Charlottesville.

It appears clearly that at this time the administrative process concerning the "grandfather" rights of Brooks including any rights it acquired from Jacobs was finally ended.

On January 24, 1951, plaintiff filed an application for a certificate authorizing it to continue a "grandfather" operation in the transportation of general commodities to and from all points within a radius of thirty-five miles of Lynchburg, which would include Piney River, stating that it had been serving this territory for twenty years and through inadvertence had omitted these points from its "grandfather" application.

After plaintiff presented certain evidence of its alleged "grandfather" operations to the field staff of the Commission, Director Blanning on February 21 wrote a letter in which he stated that the investigation failed to disclose a valid claim to the "grandfather" operation but that the application had been accepted as one for authority to extend an operation. The application was assigned Docket No. 80382, Sub. 17. On February 26, 1951, plaintiff filed a pleading entitled "Petition for correction of certificate to specifically include Piney River, Va." In March another opportunity was afforded the plaintiff to submit evidence to the field staff, at which time an additional affidavit was submitted to the general effect that the plaintiff had rendered service to Piney River since 1931. On October 16, 1951, the Commission denied the petition and entered an order containing a "cease and desist" clause.* On October 22, 1951, plaintiff filed a petition for reconsideration of the order, which petition was denied on February 4, 1952.

In the meantime, on May 18, 1951, plaintiff amended its application which had been filed on January 24, 1951, by deleting its claim to all points except Piney River and was allowed to introduce evidence of past operations at that point, which application was denied by order of Novem-

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* The "cease and desist" clause has been extended at the request of the Court until May 19, 1952.

ber 19, 1951. A petition for reconsideration was denied on February 4, 1952.

From the foregoing statement it will be seen that after numerous hearings, plaintiff's right under the "grandfather" clause to serve Piney River has been given full consideration and denied. It is to be noted that in its application of February 12, 1936, plaintiff claimed, among other routes, Amherst to Lynchburg over U.S. Highway 29. Piney River was north of Amherst on U.S. 29, but effective June 1, 1937, the plaintiff became the owner of the Jacobs "grandfather" application, which claimed operation between Charlottesville and Lynchburg over U.S. Highway 29, and after numerous hearings the Commission found that neither the plaintiff, nor its predecessor Jacobs, was entitled to serve the route including Piney River. Subsequently, in 1944, when plaintiff was granted the right to operate over U.S. Highway 29 between Charlottesville and Lynchburg, it was granted a *closed-door* operation and the administrative process was ended on November 7, 1944.

This action disposed of the entire proceedings whether considered as application for extension of service under Section 207 or as an application to correct the "grandfather" certificate under Sections 206-209.

Brooks seeks to have the orders complained of set aside and enjoined on the following grounds:

1. The orders of the Commission are arbitrary, capricious, illegal, null and void in that plaintiff was denied a fair and reasonable hearing.

2. The orders of the Commission are arbitrary, capricious, illegal, null and void in that, through failure to conduct a fair and reasonable hearing, they divest Brooks of vested statutory property rights under the "grandfather" clause of Section 206(a) of Part II of the Interstate Commerce Act.

3. The orders of the Commission are arbitrary, capricious, illegal, null and void in that the Commission exceeded its statutory powers, misconceived its functions in failing and refusing to conduct hearings, and thereby deprived plaintiff of its vested property rights.

4. The orders of the Commission are arbitrary, capricious, illegal, null and void in that they are not supported by any evidence and are contrary to substantial evidence which stands undisputed.

5. The orders of the Commission are illegal, null and void in that they fail to decide the issues presented, fail to state reasons for the action taken and, therefore, fail to conform to the requirements of the Administrative Procedure Act.

From the foregoing statement of facts it clearly appears that the plaintiff having had its claim to rights under the "grandfather" clause finally determined on November 7, 1944, by its application of January 24, 1951, undertook to reopen the matter with the object of obtaining the right to serve Piney River. During the period following the final determination in 1944 the development of a considerable industry at Piney River by the American Cyanamid Company caused a large increase in the volume of business originating at that point. This has been handled by Brooks without holding a certificate authorizing it to do so. While the record shows that there are some half dozen or more carriers authorized, willing and able to serve Piney River, Brooks has been rendering service satisfactory to the shipper there and in some manner the limitation upon the certificate held by Brooks was overlooked. In that situation Brooks undertook to again invoke its claim under the "grandfather" clause which had long since been determined adversely by the Commission and long since the expiration of the sixty-day period provided for in Rule 101 of the Commission's General Rules of Practice.

Notwithstanding the numerous hearings dealing with Brooks' purported "grandfather" claims, including those acquired by it from Jacobs, and the clear waiver of Brooks on November 12, 1943, to intermediate points on Highway 29 (Tr. 80-82) when Brooks was seeking

to obtain a closed-door operation over the same route, the Commission proceeded to hear additional evidence concerning Brooks' "grandfather" rights in 1951, under application heard by a joint board on May 18, 1951. During the course of the present proceedings the Commission also considered the application as a petition for a certificate showing public convenience and necessity in extension proceedings.

That a petition for rehearing of a proceeding before the Commission is a question addressed to the sound discretion of the Commission is too well settled to need further discussion. *Carolina Scenic Coach Lines* v. *United States,* 59 Fed. Supp., 336, affirmed 326 U.S., 680; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S., 503. Only a showing of abuse of discretion may sustain an exception to that rule. *United States* v. *Pierce Auto Lines,* 327 U.S., 315. The recital of the facts in connection with the various hearings reveals conclusively that Brooks has been afforded full opportunity to show any right it had to serve intermediate points on U.S. Highway 29 between Charlottesville and Lynchburg (which included Piney River) in the "grandfather" proceeding. That right was finally waived at the Commission's hearing on November 12, 1943 (Tr. 80), when Brooks was seeking and obtained permission for a certificate covering a closed-door operation over Highway 29.

It is equally clear from a bare recital of the facts

that Brooks has been afforded a full hearing concerning its rights under the "grandfather" clause. In this connection reference is again made to the fact that under the Commission's Rule 101 the last series of hearings could have been summarily dismissed. This was not done but upon the contrary the Commission afforded Brooks further opportunity to present such evidence in the latest series of hearings and made its finding that Brooks has failed to furnish suffiicent proof of service to Piney River prior to and continuously since June 1, 1935. At most, the application if considered as being based upon the "grandfather" clause, was a petition for reconsideration or a further hearing and Brooks could not complain if no reason had been assigned for his denial. *Carolina Scenic Coach Lines* v. *United States,* supra.

Turning to a consideration of the application as one for an extension of service, it is well settled that the question on review is not whether the Court would have made the same findings as the Commission on the record before it, but is: Was there a rational basis for the finding made by the Commission? *Norfolk Southern Bus Company* v. *United States,* 96 Fed. Supp., 756, affirmed 340 U.S,. 802; *Brooks Transportation Company* v. *United States,* 93 Fed. Supp., 517, affirmed 340 U.S., 925; *Arlington County Board* v. *United States,* 101 Fed. Supp., 328. See also *Interstate Commerce Commission* v. *Parker,* 326 U.S., 60.

However, the record contains adequate evidence to support a finding that public convenience and necessity does not require service at Piney River by Brooks.

Eight motor vehicle carriers appeared in opposition to the application at the hearing and proved to the satisfaction of the Commission that they were able and anxious to supply the service.

From the foregoing it is obvious that the plaintiff has been afforded a fair and reasonable hearing by the Commission; that the Commission has not exceeded its statutory powers nor misconceived its functions; nor has it deprived plaintiff of any vested property rights; the orders of the Commission are supported by the evidence and the Commission has fully complied with the requirements of the Act. In fact, upon consideration of the entire record it is obvious that the conclusion of the Commission not only has a rational basis but it is the proper conclusion in view of the facts disclosed by the record.

The injunction is denied and the suit dismissed.

(Sgd) ARMISTEAD M. DOBIE
United States Circuit Judge

(Sgd) STERLING HUTCHESON
United States District Judge

(Sgd) ALBERT V. BRYAN
United States District Judge

MAY 12, 1952

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 190

BROOKS TRANSPORTATION COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF FALWELL FAST FREIGHT, INCORPORATED, AND RED LINE, INC., TO AFFIRM

WILMER A. HILL,
Counsel for Appellees.

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MOTION OF APPELLEES FALWELL FAST FREIGHT, INCORPORATED, AND RED LINE, INC., TO AFFIRM

Appellees Falwell Fast Freight, Incorporated, and Red Line, Inc.,[1] move that the judgment of the District Court be affirmed.

As indicated in the joint motion to affirm filed heretofore by the United States of America and the Interstate Com-

[1] By order entered November 26, 1951, in the United States District Court for the Eastern District of Virginia (Richmond Division), these appellees were "permitted to intervene and participate in all further proceedings before this Court as parties defendant."

merce Commission, in which we respectfully ask leave to concur, this is a direct appeal from the final judgment entered on May 12, 1952, by a District Court of three Judges specially constituted pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing appellant's complaint, which sought to set aside certain orders of the Interstate Commerce Commission, hereinafter called the Commission. Appeal was allowed on May 23, 1952, but appellant did not serve its appeal papers upon appellees Falwell Fast Freight, Incorporated, and Red Line, Inc., within five days after allowance of the appeal, as required by Rule 12, paragraph 2, of the Rules of this Court. The appeal papers were first served upon these appellees on July 14, 1952, after the record on appeal had been docketed in this Court.

The orders of the Commission attacked in this proceeding denied to appellant operating rights to serve Piney River, Virginia, which appellant claimed under the "grandfather" clause of section 206(a) of the Interstate Commerce Act, 49 U.S.C. 306(a). The District Court unanimously upheld the Commission's orders and thereafter declined to stay its judgment pending appeal. On application by appellant to this Court for such a stay, the requested stay was again denied.

The pertinent facts sustaining the action of the Commission and the District Court are fully set forth in the opinion of the District Court.[2] They may be summarized as follows:

The gist of this whole proceeding is the unauthorized service which appellant has been rendering as a motor common carrier at Piney River, Virginia, since November 12,

[2] The District Court's opinion has not yet been reported. A copy of its opinion was attached to the petition for a stay pending appeal which appellant filed with this Court and was attached as an appendix to the aforementioned motion to affirm heretofore filed jointly by the United States and the Interstate Commerce Commission.

1943, when at a formal hearing before the Commission appellant withdrew its request for any authority to serve any intermediate point between Charlottesville and Lynchburg, Virginia. As shown at page 12 of the decision of the District Court, Piney River is such an intermediate point. By a report and order issued on November 7, 1944, the Commission found that appellant had failed to establish its claim to "grandfather" rights to serve Piney River, but granted it authority to operate over the described highway in "closed-door" service (without service at any intermediate point) for operating convenience only.

Having been expressly denied authority to serve points between Charlottesville and Lynchburg (which would include Piney River, of course), appellant simply rendered the service without the least vestige of authority. So matters continued until in January, 1951, appellant filed an application (subsequently amended so as to confine it to Piney River only) for a certificate authorizing it to continue a so-called "grandfather" operation in the transportation of general commodities, with customary exceptions, to and from all points within a radius of 35 miles of Lynchburg. Piney River is within such 35-mile radius. The Commission assigned this application for formal hearing. At that hearing the application was opposed by eight motor carriers, properly qualified and certificated, which, as stated by the District Court, "proved to the satisfaction of the Commission that they were able and anxious to serve Piney River." The unauthorized operations of appellant have long deprived these eight certificated motor carriers, including appellees Falwell Fast Freight, Incorporated, and Red Line, Inc.,[2] of the opportunity to share in the traffic at Piney River. Appellant seeks to leave the impression

[2] Each of which holds authority from the Commission to operate in the carriage of general commodities, with the usual exceptions, over regular routes, to and from Piney River.

with this honorable Court that it was deprived of a full and fair hearing on the said application, but the record before the Commission discloses that *no evidence of any sort proffered by appellant was excluded from the record,* and the decision of the Commission discloses that it *considered* all the evidence.

Appellees Falwell Fast Freight, Incorporated, and Red Line, Inc., respectfully submit that this appeal is wholly lacking validity. The District Court, as indicated, properly found that appellant's claimed "grandfather" rights "had been given full consideration by the Commission"; and that when on November 7, 1944, appellant was granted a closed-door operation between Charlottesville and Lynchburg "the administrative process was ended"; and that the application made in 1951 for a reopening of the issue was "addressed to the sound discretion of the Commission" and, under the Commission's rules, "could have been summarily dismissed." The District Court observed that the Commission did not do this, but, rather, gave appellant every opportunity to present evidence. As said hereinbefore, not only was none of appellant's proffered evidence rejected or excluded from the record, but the Commission expressly *considered* all the evidence offered by appellant. The District Court, citing *Carolina Scenic Coach Lines* v. *United States,* 59 F. Supp. 336 (W.D.N.C.), affirmed 326 U.S. 680, said that appellant would have no right to complain if "no reason had been assigned for" denial of reconsideration, but that the Commission had, in fact, made a finding that the proof submitted was insufficient to establish service by appellant to Piney River prior to and continuously since June 1, 1935, the "critical" date fixed by the Interstate Commerce Act for determining "grandfather" rights.

Appellant's claims have been given full consideration, both by the Commission and by the District Court, and

have been found to be without merit. Appellant makes no showing that its appeal presents any question of substance, and it is manifest from the decision of the District Court that no such question is presented. The decree of the District Court should be affirmed.

Respectfully submitted,

FALWELL FAST FREIGHT,
INCORPORATED,
RED LINE, INC.,
Appellees,
By WILMER A. HILL,
Their Attorney.

July 25, 1952.